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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 865

HOMER R. SIMMONS, *Petitioner*

v.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, *Respondent*

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI

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To The Honorable Chief Justice and The Associate Justices Of The Supreme Court Of The United States:

The Kansas City Southern Railway Company, Respondent herein, prays that the Petition for Certiorari of Homer R. Simmons, be dismissed, or, in the alternative that it be denied. Respondent denies jurisdiction and denies error, and in support of such contention presents the following:

STATEMENT OF THE CASE

Petitioner brought an action in the District Court of Jefferson County, Texas, against Respondent under the provisions of the Federal Liability Act, 45 *U.S.C.A.*, Section 51-59, as amended, (hereinafter referred to as "F.E.L.A."). Upon trial of the case, the jury returned a verdict in favor of the Petitioner in the sum of One Hundred Thirty-Nine Thousand Six Hundred Fifteen and No/100 ($139,615.00) Dollars. Prior to the trial, the parties stipulated that a credit would be due the Respondent against any judgment, in the sum of Four Thousand Nine Hundred and No/100 ($4,900.00) Dollars, representing advancements theretofore made to the Petitioner by Respondent. After verdict, judgment was entered for One Hundred Thirty-Four Thousand Seven Hundred Fifteen and No/100 ($134,715.00) Dollars, being the difference between the verdict and the aforementioned credit. (A copy of such judgment, reflecting the nature of the $4,900.00 credit, appears at pages A-1 and A-2 of Simmons' Petition.)

The case was appealed by Respondent to the Court of Civil Appeals in the Ninth Supreme Judicial District. Such court affirmed the trial court on all points save the question of damages, holding the verdict and judgment to be excessive and suggested a remittitur in the sum of Forty Thousand and No/100 ($40,000.00) Dollars, (Opinion reported at 350 S.W. 2d 844 and set out in full at pp. A2-A8 of Simmons' Petition).

In suggesting a reformation of the judgment to reflect the $40,000.00 remittitur, the Court inadvertently failed to credit Respondent with the Four Thousand Nine Hundred and No/100 ($4,900.00) Dollars covered by the aforementioned stipulation.

Upon motion of Respondent, the Court of Civil Appeals acknowledged its mathematical error and allowed the credit of Four Thousand Nine Hundred ($4,900.00) Dollars, reducing its suggested judgment from Ninety-Nine Thousand Six Hundred Fifteen ($99,615.00) Dollars to Ninety-Four Thousand Seven Hundred Fifteen ($94,715.00) Dollars. (The Court merely corrected its own error to reflect the stipulations and agreements of the parties, and did not, as suggested by Petitioner at page 11 of his Petition ". . . like Lizzie Borden, after giving the Petitioner 40,000 whacks, . . ." redetermine the amount of remittitur.)

Petitioner thereupon filed Application for Writ of Error to the Supreme Court of Texas, which writ was refused.

JURISDICTION

Jurisdiction is denied. Although the action was properly brought under the Federal Employers Liability Act (45 *U.S.C.A.*, Sections 51-59, as amended) such does not, in and of itself, create special jurisdiction nor furnish any extraordinary grounds for the Court to exercise its discretion in granting certiorari, there being no federal statute, or rule of this Court, creating jurisdiction peculiar to Federal Employers Liability Act cases. The petition for certiorari of petitioner cites no such statute or rule giving the Court any additional jurisdiction or additional discretion in a case of this type.

Petitioner contends that jurisdiction is sustained by 28 *U.S.C.A.*, Section 1651, Sub-Section (2). Such Section does not authorize certiorari to state courts, 28 *U.S.C.A.*, Section 1257 being the only proper statutory authority for such proceedings.

Insofar as Petitioner contends that there is jurisdiction under 28 *U.S.C.A.*, Section 1257 because he has been denied either the right of trial by jury in contravention of the Seventh Amendment, or some un-named "federal right", the Respondent's grounds for denying such jurisdiction are contained under the heading of "Argument and Authorities" under Respondent's Counterpoint No. 2.

COUNTERPOINTS OF RESPONDENT

1. The sole question presented by the Petition of Simmons is whether the requiring of a remittitur in an F.E.L.A. case by the Texas Court of Civil Appeals, which has the exact same scope of authority as the trial court, under the Texas Rules of Civil Procedure, to review judgments for excessiveness and require remittiturs in proper cases, denied Simmons the right of trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States.

2. Where the claimant has exercised his option in filing an F.E.L.A. case in the state court, the review of jury verdicts as to excessiveness, and the requiring of remittiturs where they are indicated, according to local practice, does not deny such right of trial by jury to a claimant, whether such power of review is exercised by the trial or appellate court.

3. The action of the Court of Civil Appeals in requiring a $40,000.00 remittitur in this case was supported by the record in the cause.

Respondent's Counterpoint No. 1 Restated

1. The sole question presented by the Petition of Simmons is whether the requiring of a remittitur in an F.E.L.A. case by the Texas Court of Civil Appeals, which has the exact same scope of authority as the trial court, under the Texas Rules of Civil Procedure, to review judgments for excessiveness and require remittiturs in proper cases, denied Simmons the right of trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States.

ARGUMENT AND AUTHORITIES

Petitioner represents that three questions are presented to the court in this proceeding. The self-serving manner in which these purported questions are framed tends to obscure the real question in issue, and it would seem well at the outset to analyze petitioner's position in order to narrow the issue in controversy.

In his first "Question Presented" he contends that he has been denied the right of trial by jury because the Court of Civil Appeals required a remittitur" . . . by exercising its original discretion, not restricted by the facts adduced on trial . . .". This represents a self-serving conclusion of the petitioner and is, in fact, clearly rebutted by a reading of the opinion of the Court of Civil Appeals, which is quoted in the appendix to Simmons' petition. A reading of such opinion, particularly those portions appearing at pages A-5 through A-7 of Simmons' petition; indicates that the court very carefully considered the evidence adduced on trial in determining that the verdict was excessive, and referred to other reported cases only as an aid in exercising its sound judicial discretion to determine what would be reasonable under the circumstances.

"Questions Presented" Nos. 2 and 3 of the Petition are self-serving conclusions of the petitioner, and beg the question supposedly presented in "Question Presented" No. 1, in that they presuppose that the Texas Court of Civil Appeals was bound by the rule of practice in federal courts which limits the scope of review on excessiveness in federal appellate courts to an examination of the discretion exercised by the trial judge in his handling of the matter.

The limitation of scope of review is imposed on the federal courts by the operation of the Seventh Amendment to the Constitution of the United States (*Lumbermen's Mutual Casualty Company v. Elbert*, 348 U.S. 48, 75 S. Ct. 151 (1954), See, e.g., footnote 5, 75 S. Ct. at page 154), while Rules Nos. 328, 439 and 440 of the *Texas Rules of Civil Procedure*, set out in full at pages A-17 and A-18 of Simmons' petition, when taken together, authorize a broader scope of review than that allowed to federal appellate courts. "Question Presented" No. 1 inquires as to whether the Seventh Amendment applies to state courts, and, as will be shown, it most assuredly does not.

To reframe slightly, the real question is whether the state appellate court is *required* to follow the procedural rule imposed upon federal courts by the Seventh Amendment, and not whether it *did or did not* follow such rule, as is suggested by petitioner in his "Questions Presented" Nos. 2 and 3, there being no question that the Texas procedure varies from the federal procedure.

Respondent's Counterpoint No. 2 Restated

2. Where the claimant has exercised his option in filing an F.E.L.A. case in the state court, the review of jury verdicts as to excessiveness, and the requiring of remittiturs where they are indicated, according

to local practice, does not deny such right of trial by jury to a claimant, whether such power of review is exercised by the trial or appellate court.

ARGUMENT AND AUTHORITIES

With deference to the spirit of Rule 40 of the *Rules of Practice* in this court concerning brevity and conciseness of briefs, Respondent will not attempt a detailed analysis of the many and varied arguments appearing in Simmons' petition. The general import of these various arguments will here be only briefly characterized.

Simmons emphasizes the fact that in such cases as *Brown v. Western Railway of Alabama*, 338 U.S. 294, 70 S. Ct. 105 (1949), this court has stated the necessity of protecting federal rights from "over-exacting local requirements". Petitioner then points out that the Texas procedural rule governing scope of review for excessiveness in appellate courts differs from the federal rule, which in and of itself seems to vary from Circuit to Circuit. He concludes that this Court should grant certiorari in this case and announce (1) a standard rule of procedure for all federal courts in these matters, and (2) that such procedural rule limiting the scope of review of federal courts to an examination of the discretion exercised by the trial judge in passing on the excessiveness question should be imposed on all state court systems when dealing with F.E.L.A. cases.

In support of these contentions, petitioner presents a rather lengthy history of the F.E.L.A. cases in which this court has reviewed the handling of them in state courts, holding that federal law and not state law governs the action. As will be pointed out, the cases so cited deal with matters of substance—the very nature of the cause of action created by the F.E.L.A.—and not the procedural

handling of such cause of action. This court has, with equal consistency, held that the procedural handling of F.E.L.A. cases is a matter to be left to the rules of the state courts.

The fact that Congress saw fit to expressly grant *concurrent* jurisdictions to state courts to try F.E.L.A. cases, in logic, excludes the premise that the grant intended to make the state courts into federal courts when trying such cases. And it is elemental that Congress, in providing for the enforcement of federally created rights in state courts, takes the state courts as it finds them concerning procedural rules governing the conduct of litigation, which have been provided by the state for all litigants who seek redress from its courts. In *Brown v. Gerdes*, 321 U.S. 178, 64 S. Ct. 487 (1944), Justice Frankfurter pointed out in a concurring opinion, 64 S. Ct., at page 493:

> "The simple fact is that from 1789 to this day, no act of Congress has attempted to force upon state courts the duty of enforcing any right created by federal law on terms other than those on which like litigation involving rights other than federal rights is required to be conducted in a state court."

And at 64 S. Ct., page 494:

> "The federal law in any field within which Congress is empowered to legislate is the supreme law of the land in the sense that it may supplant state legislation in that field, *but not in the sense that it may supplant the existing rules of litigation in state courts.*" (Emphasis added)

Again, for the sake of brevity, respondent will not attempt to cite the legion of cases in which this Court has

held that the Seventh Amendment jury trial requirements do not apply to litigation in state courts. Specifically, however, in *Minneapolis & St. Louis Railway Company v. Bombolis*, 241 U.S. 211, 36 S. Ct. 595 (1916), in an unanimous opinion, this court most emphatically stated that such is the law in F.E.L.A. cases tried in state courts. At 36 S. Ct., page 596, this court states:

> "Two propositions as to the operation and effect of the 7th Amendment are . . . conclusively determined . . . (a) The first ten amendments; including, of course, the 7th, are not concerned with state action and deal only with federal action. (citing numerous cases) . . . (b) The Seventh Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever, govern or regulate trials by jury in state courts, or the standard which must be applied concerning the same." (citing numerous cases).

Further, in *Second Employers Liability Cases*, 223 U.S. 1, 32 S. Ct. 169 (1912), this court, in construing the meaning of the "concurrent jurisdiction" feature of the F.E.L.A., said 32 S. Ct. at page 178:

> "We deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, *or to control or affect their modes of procedure*, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion, and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the Act of Congress." (Emphasis added)

In *L. & N. RR Co. v. Stewart*, 241 U.S. 261, 36 S. Ct. 586 (1916), it was said (36 S. Ct., at page 588):

> "The notion that a substantive right vesting under the law of one jurisdiction cannot be recognized and enforced in another, at least as between the United States and the States, unless by procedure identical with that of the first, is disposed of in *Minneapolis & St. Louis v. Bombolis*. . . ."

And, in *Dickinson v. Stiles*, 246 U.S. 631, 38 S. Ct. 415 (1918), it was said (38 S. Ct., at page 416):

> "The Minnesota statute . . . affects neither the amount recovered nor the person by whom it is recovered nor again the principal of distribution. It deals only with the necessary expenses of recovery. Congress . . . did not regulate attorneys' fees. *It contemplated suits in the state courts and accepted state procedure in advance.*" (Emphasis added)

Bombolis and *Stewart*, supra, involved the question of whether the state rule allowing a majority rather than unanimous verdict denied the parties the right of trial by jury in F.E.L.A. cases, and *Dickinson*, supra, involved the question of whether or not the Minnesota statute concerning attorneys' fees should be applied in F.E.L.A. cases.

In still another case, the court stated in *Missouri Ex Rel, Southern Railway Co. v. Mayfield*, 340 U.S. 1, 71 S. Ct. 1 (1950), in an F.E.L.A. case tried in the state courts of Missouri (71 S. Ct., at page 3):

> "Therefore, if the Supreme Court of Missouri held as it did because it felt under compulsion federal law as enunciated by this Court to so hold, it should be relieved of that compulsion. It should be free to de-

> cide the availability of the principal of *forum non conveniens* in these suits according to its own local law."

That the general principle announced in *Bombolis*, supra, and the other cases cited above—that procedural rules of the *forum* are to be applied in the handling of F.E.L.A. litigation with the federal decisions applying only to questions going to the substance of the cause of action—remains inviolate is apparent from a careful reading of the cases cited by petitioner for his proposition that the federal rule of decision should apply to both procedural and substantive matters.

In *Brady v. Southern Railway Company*, 320 U.S. 476, 64 S. Ct. 232 (1943), it was said that 64 S. Ct. 234:

> "Only by uniform federal rule *as to the necessary amount of evidence* may litigants under the federal act receive similar treatment in all states. (Citing cases). *It is true that this Court has held that a state need not provide in FELA cases any trial by jury according to the requirements of the Seventh Amendment.* (Citing Bombolis) But when a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question."

Thus the Court has said that question of *who* is to determine sufficiency of the evidence is a matter of local procedural rules, the question of *what constitutes* sufficient evidence under the Act being the only federal question involved.

The same question, presented in a different manner, was involved in *Brown v. Western Railway of Alabama*, 338 U.S. 294, 70 S. Ct. 105 (1950).

The Court, at 70 S. Ct. 106, while pointing out the difficulty in distinguishing between substance and procedure in some areas, acknowledges that the distinction must be made and that the federal rule of decision is to be applied only to questions of substance.

As to the necessity of making the distinction in cases concerning sufficiency of the evidence as governed by local rules, the Court states:

> "Fortunately, we need not attempt to do so. A long series of cases previously decided from which we see no reason to depart, makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress."

Again, the Court is saying that it will look at *what* constitutes sufficiency of evidence or pleading under the statute, and not *who* in the local judiciary system determines the question.

Even in *Dice v. Akron, Canton and Youngstown Railway Co.*, 342 U.S. 359, 72 S. Ct. 312 (1952), the majority opinion recognizes and reiterates the rule in *Bombolis* and does not attempt to overrule it, although the case has been cited as going the fartherest of any case in imposing the federal jury trial rules upon state courts.

The above cases are representative of those cited by Simmons in his petition in support of his argument that the Seventh Amendment jury trial rules should apply to F.E.L.A. cases in state courts. That the cases do not so hold is apparent. The questions presented in those cases, and almost all of the other cases cited in Simmons' petition —sufficiency of evidence and pleading and determination of issues of liability—were extremely close as concerns

whether the state rules had a procedural or substantive effect upon their determination. Yet in each of these cases, this Court recognized the necessity of making the distinction and applying the federal rule of decision *only* to matters going to the substance of the cause of action created by the F.E.L.A.

Just as in the *Brown* case, supra, where the Court stated that the distinction between substance and procedure had been made in cases concerning sufficiency of the evidence, in favor of Supreme Court review, respondent submits that the distinction has also been made by this Court concerning the very question here presented, and that such distinction has been made in favor of leaving the question of scope of review of state appellate courts on excessiveness within the procedural realm not reviewable by this Court.

In *Rogers v. Missouri Pacific*, 352 U.S. 500, 77 S. Ct. 443 (1957), this Court reversed a judgment entered by the Supreme Court of Missouri and ordered the jury verdict reinstated. After making its ruling on sufficiency of the evidence to support the verdict, this Court referred to "other questions not decided below" (including the question of excessiveness of the verdict) and stated, 77 S. Ct. at page 451:

> "We have considered the remaining questions not passed upon and find them to be unsubstantial".

On remand, the Supreme Court of Missouri reconsidered the case and stated, 308 S.W. 2d 688 at pages 691, 692 and 693:

> "It seems then, that the effect of the United States Supreme Court having determined that certain questions raised in but not passed on by the Missouri

> Supreme Court were unsubstantial would depend upon whether those questions were Federal questions, that is, whether they involved Rogers' substantive rights claimed under the Federal Act, or whether they were questions exclusively for consideration and disposition by the Supreme Court of Missouri . . . we are of the opinion that the question of excessiveness of verdict was a non-federal question and one, therefore, to be decisively determined by the Supreme Court of Missouri.
>
> "It follows, therefore, that the opinion of the United States Supreme Court to the effect that the question *relating to the claimed excessive verdict in the Rogers case was unsubstantial was a ruling that a non-federal question not passed upon by the Missouri Supreme Court was an unsubstantial question . . .*" (Emphasis added)

Much more compelling is the saga of *Deen v. Gulf, Colorado and Santa Fe Railway Co.*, an F.E.L.A. case which came up through the Texas appellate courts involving, among others, the exact question here presented. At the outset, the Texas Court of Civil Appeals reversed and entered judgment for the railroad (275 S.W. 2d 529). This Court reversed (353 U.S. 925, 77 S. Ct. 715) (1957) and remanded for judgment for the plaintiff. On remand, the Texas Court of Civil Appeals affirmed the judgment on the entry of a remittitur of $5,500.00. (306 S.W. 2d 171). The Texas Supreme Court affirmed the remittitur but reversed with directions to pass upon the manifest weight of the evidence. Separate petitions for certiorari against the railroad and for mandamus against the Texas Supreme Court were filed in this Court. The certiorari questioning the remittitur was denied (358 U.S. 875, 79 S. Ct. 111) (1958). The petition for mandamus was al-

lowed and the Court held that consideration of the weight of evidence had been foreclosed by the previous opinion. (358 U.S. 57, 79 S. Ct. 1) (1958).

The Texas Supreme Court then entered judgment that affirmed the remittitur. (317 S.W. 2d 913). In so doing, the Court stated, 317 S.W. 2d at page 914:

> "As to this, it is enough to say that, since we have heretofore decided, as above stated, that the Court of Civil Appeals had the power to require the remittitur, and since the above described action of the Supreme Court of the United States conspicuously forbears to disturb that part of our decision, but on the contrary, denies the writ of certiorari wherein the plaintiff sought to review it, we must decline to reconsider the question on its merits."

Thereupon, Deen filed a third petition for certiorari raising the sole question of whether the Texas courts, in view of the 7th Amendment, could order a remittitur under the Texas Rules of Civil Procedure, being the exact, same and identical question here presented. Such petition cited substantially the same authorities as are cited in Simmons' petition. It put squarely before the Court the exact question which is here presented, and, in fact, put it before this Court the second time in that case. The petition was denied, (with the notation: "Mr. Justice Douglas is of the opinion that certiorari should be granted.") 359 U.S. 945, 79 S. Ct. 725 (1959).

Petitioner refers to the *Deen* case, but brushes it off, citing the language of this Court in *Atlantic Coastline RR Co. v. Powe*, 283 U.S. 401, 51 S. Ct. 498 (1931), that "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the Bar has been told many times. . . ." Such may be true in the

ordinary case, but there is nothing ordinary about the saga of Earl R. Deen. In view of the oft cited language in *Brown*, supra, and other cases cited in Simmons' petition, to the effect that this Court will grant certiorari in every case in which it feels that the rules of local practice have denied claimants under the F.E.L.A. the substantive rights guaranteed by the Act, and the fact that the question here involved was squarely and unequivocally presented to this Court twice in the same case by petition for certiorari, respondent views the denial of certiorari as representing the opinion of this Court that there is no merit in the contention here being made.

That such is the effect of the *Deen* saga has been the conclusion in at least two jurisdictions (*Missouri Pacific RR Co. v. Kimbrell*, 160 Tex. 542, 334 S.W. 2d 283) (1960); *Smith v. Ill. Cent. R. Co.* (Ill. App.), 172 N.E. 2d 803 (1960). In almost every other jurisdiction in the United States, the rule that local rules govern the scope of review on excessiveness of damages and remittitur practice is followed. See e.g., *St. Louis and San Francisco Ry. Co. v. King* (Sup. Ct. Okla.), 278 P. 2d 845; *Joyce v. Missouri, Kansas and Texas Ry. Co.* (Mo.), 189 S.W. 2d 568; *Rivera v. Atcheson, Topeka and Santa Fe Ry. Co.*, (Sup. Ct. N. M.), 299 P. 2d 1090; *Vivian v. Atcheson, Topeka and Santa Fe Ry. Co.* (Sup. Ct. N. M.), 363 P. 2d 620.

Respondent submits that the Texas Rules of Civil Procedure, previously cited, granting to the Texas Court of Civil Appeals the same scope of review for judgments as to excessiveness as the trial court has, is clearly procedural and has no effect whatsoever in the substantive rights of the claimant. Petitioner does not deny, and, in fact, seemingly admits, that all *trial* courts, both state and federal,

have the power to do what was done here by the Court of Civil Appeals. The well reasoned opinion in *Dagnello v. Long Island R. Co.*, 289 F. 2d 797 (2nd Cir. 1961) we think puts to rest once and for all the question of whether or not federal courts, under the 7th Amendment, may review verdicts for excessiveness, and require remittiturs in proper cases. The case presents an exhaustive review of the history of remittitur practice on appeal, and concludes that it is part and parcel of the common law and therefore, as a substantive matter, federal appellate courts may review verdicts for excessiveness and require remittiturs where proper, being limited only under the amendment as to the *scope* of review.

Thus, in F.E.L.A. cases tried in both state and federal courts, jury verdicts may be reviewed for excessiveness, and remittiturs required in proper cases. This latter rule concerns *what* may be done without doing violence to the substance of the right created under F.E.L.A. The question here presented is *who* may exercise a particular scope of review which, as has been stated, *someone* in the judicial system, either state or federal, may exercise. The Texas Rules of Civil Procedure grant to the Texas Court of Civil Appeals the right to exercise a scope of review, which as a substantive matter, *may* be exercised in F.E.L.A. cases, and respondent submits that the effects of such rules are merely procedural and that the claimant is denied no federal right by the application of such procedural rules.

Respondent's Counterpoint No. 3 Restated

3. The action of the Court of Civil Appeals in requiring a $40,000.00 remittitur in this case was supported by the record in the cause.

ARGUMENT AND AUTHORITIES

Respondent does not deem it appropriate, under the rules of this Court, on petition for certiorari to dwell at length on the merits of the cause. Attached hereto as an appendix is a partial synopsis of the medical evidence appearing in the Statement of Facts in the cause.

Taking together the synopsis of evidence presented in the appendix to Simmons' petition, which is quite understandably drawn most favorably to his position, the synopsis of the evidence contained in the appendix to this reply, the record as a whole, and the evidence as set forth in the Court of Civil Appeals' opinion previously referred to, we submit that it cannot be said that the Texas Court of Civil Appeals in this case clearly abused the discretion granted to it under the aforementioned Texas Rules of Civil Procedure.

SUMMARY

Jurisdiction:

Jurisdiction is denied. The requirement of a remittitur is not the denial of any federally guaranteed right of trial by jury in an F.E.L.A. case, whether such remittitur is required by the trial court, or an appellate court which has the same authority as a trial court under the rules of Texas practice. The remittitur required in this case by the Court of Civil Appeals was well supported in the record. No federal right of Simmons has been violated, nor has any substantial federal question here been presented.

Argument:

Although this Court has granted certiorari and decided numerous F.E.L.A. cases, holding that the rule of federal decision, and not local rules, apply in the situations there

involved, almost all such cases concerned the effect of local practice as to sufficiency of evidence and pleadings, and the presentation of liability issues to the jury. In such cases this court has taken pains to point out that it must clearly distinguish between substantive and procedural rules of local jurisdictions and that it will apply federal rules of decision only where the substance of the cause of action created by the F.E.L.A. is effected.

It has been held in numerous cases that the jury trial requirements of the Seventh Amendment do no apply to state courts. Simmons had an election to file his suit in either the state or federal court. Had he filed it in the federal court, and the trial court required a remittitur, no federal right would have been involved. Had a federal appellate court, within its scope of review as limited by the Seventh Amendment, found the verdict to be excessive and required a remittitur, no federal right would have been involved. Where he chooses to file his case in a state court where both the trial and appellate courts have the same scope of review concerning excessiveness of verdicts and requirements of remittitur, the requirement of a remittitur by either court under such rules does not deny him any federal right. It was not the intention of Congress, nor has it been the intention of this Court, that state courts should become federal courts when trying F.E.L.A. cases, the grant of jurisdiction being *concurrent* and not requiring the application of the identical procedural rules that are applied in federal courts.

The suggested remittitur of the Court of Civil Appeals in this case is well supported by the record. If it be determined that this Court has jurisdiction to review remittiturs required in all F.E.L.A. cases, then there is ample support

in the record for the action of the Court of Civil Appeals in this case. Certainly certiorari should not be granted in order to determine whether this Court would have acted *exactly* as the Court of Civil Appeals did in the exercise of its discretion. The test is whether there was a clear abuse of the discretion granted to the Court of Civil Appeals by the Constitution and Laws of the State of Texas.

Assuming the state courts, trial or appellate, do have jurisdiction to review verdicts for excessiveness and require remittiturs where proper in F.E.L.A. cases, then, the exercise of such judicial discretion would not be a proper subject for certiorari unless it is shown that there is a clear abuse, which has not been done by petitioner in this case...

CONCLUSION

Respondent respectfully submits that the petition for Writ of Certiorari should be denied or dismissed, there being no federal question involved.

Respectfully submitted,

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APPENDIX

PARTIAL SYNOPSIS OF MEDICAL EVIDENCE TAKEN FROM STATEMENT OF FACTS BELOW

At the time of his injury plaintiff was being paid at the rate of $17.22 per day as a fireman on a passenger train. (S.F. 6). In 1958, the year preceding his injury, Mr. Simmons made a little over $7,000.00 (S.F. 6). In 1957, Mr. Simmons made $7,400.00 (S.F. 6). In 1956, Mr. Simmons made $7,200.00 (S.F. 6). All this money was made as a fireman, except for a few days he worked as an engineer. (S.F. 7).

In 1942 Mr. Simmons began working for the railroad and under his own testimony he was about number 135 or 140 on the seniority list. (S.F. 8). At the time of his injury, in 1959, he was about 82 or 83 on the seniority list (S.F. 9). This was of course some 17 years later. There is no evidence that Mr. Simmons was in line for an immediate promotion and there is no evidence that he would have received a greater rate of pay at some later time.

Turning to the question of injuries received by Mr. Simmons, we must look to the testimony of Dr. Heinz K. Faludi. The testimony of this medical witness was introduced by the plaintiff himself. In other words, this doctor was plaintiff's own witness.

Dr. Faludi first examined the plaintiff on January 27, 1960 (S.F. 170). It was indicated to him, as revealed by the history taken down by him, that plaintiff was hurt on May 10, 1959, and that a disc between L4 and L5 had been removed on July 14, 1959 (S.F. 172).

As to the general health of the patient Dr. Faludi said that the patient had been treated for peptic ulcers off and on for the past eighteen years.

Dr. Faludi made an examination of the plaintiff and when asked to give the nature of the examination and the findings he stated:

> "I'll be happy to. I examined this patient and found that he is a forty-six-year-old white male patient. He appeared to be cooperative and pleasant during the examination. The patient was what we describe of asthenic habitus, which means that he is of a skinny type or somewhat slender type. He appeared to be in acute distress. When he walked, it would seem that he walked with a severe limp and he tended to protect his right leg. Examination of the head and neck were negative, the lungs seemed to be normal, heart examination was negative, blood pressure was one hundred and ten (110) over eighty (80), which is normal. Examination of the abdomen was essentially negative. On examining the patient's low back I found that he had an incisional scar in mid line extending from about L3 to S1 which appeared to have well healed. There was still tenderness over the lumbrosacral region of this incision." (S.F. 173-174).

The doctor further stated that his examination revealed that there was an indication of some involvement of the nerves in the lower back. In the doctor's opinion the patient most likely had a radiculitis involving the L5 and S1 nerve root on the right. Describing this condition the doctor said:

> "Radiculitis means involvement of the nerve root of L5 and S1 on the right, and with the history that I had obtained that this patient had a previous operation I felt most likely that radiculitis was secondary to the previous disc removal and operation and I felt

that these were residuals of the previous pathology which supposedly had been removed." (S.F. 180).

When asked about the treatment recommended the doctor stated:

"Yes, I recommended that this patient continue with conservative treatment and then I said only if completely unable to give the patient relief with conservative treatment that one should consider a re-exploration in order to free patient of the scar formation and possibly to perform a posterior rhizotomy—which is cutting the pain fibers of these nerves—if it were found that the root was irreparably damaged, in order to give the patient relief." (S.F. 180-182).

A myelogram was performed by Dr. Faludi and his testimony in this respect is as follows:

"Q. Tell us, Doctor, what you found as a result of your X-ray examination on the myelogram test,

A. Well, what we found was—when we performed this spinal puncture we found that the spinal fluid was clear; we found that the initial pressure of the spinal fluid was one hundred and forty millimeters, which can be considered normal; we found that the manometric tests which were performed on the spinal fluid were negative and there was no sign of any obstruction to the spinal fluid flow. When we introduced the pantopaque, which is the medicine we use to visualize this area, we found that the myelogram showed a questionable defect at the level of L4.

Q. You said at the level of L4; is that the fourth lumbar vertebra?

A. Fourth Lumbar Vertebra, that is right. And from the appearance of this X-ray defect we felt that

it was more likely that this patient had old scar formations around the nerve root rather than a new herniation of a disc, and it was my feeling that this patient apparently had residuals from his previous disc pathology and that he had formed scar formation compressing the lumbar nerve roots, particularly the L5 nerve root, which is the one that runs at the L5 vertebra on the right side.

Q. Why would scar formation form in that area, Doctor?

A. Well, scars may form after injuries and scars may form following surgery, and it may be that that scar was a residual from the previous surgery.

Q. Scar tissue is tissue the body puts out to replace normal tissue, is that right?

A. That is correct.

Q. Whenever you remove or damage or injure normal tissue, the body will seek to replace that normal tissue with scar tissue?

A. Yes, that is right; it is the body's way of repairing injury." (S.F. 186-188)

Concerning work after the alleged injury, the patient told the doctor that he worked at a liquor store for nine days but because of having to lift cases of beer, he had to quit. (S.F. 189).

The only evidence from this medical witness concerning the plaintiff's ability to work is as follows:

"Q. Doctor, in your opinion, based upon all of your observations of this man, in his present condition is he able to engage in work which requires sustained heavy lifting or stooping, bending, that sort of thing, heavy manual work?

A. I do not believe so, not in the condition he is in now." (S.F. 189)

It will be noted that the question was phrased in the term of heavy lifting and heavy manual labor and that the answer was given in the terms of the present and not the future. There is no direct medical testimony to show future disability. In fact, in all probability, the operation suggested by Dr. Faludi would have been successful and has proved to be in most cases (S.F. 194-200). It is even shown that if the suggested operation was successful plaintiff would be able to work as a fireman or engineer. (S.F. 204-205)